Questionnaire concerning Business, Sports & Fraud

Sports Law Commission

International Business Law Commission

Commercial Fraud Commission

54th Annual AIJA Congress

Munich, 2016

Grégoire Mangeat/Fanny Margairaz
Mangeat Avocats
Passage des Lions 6
1211 Genève
+41 22 319 22 00
gregoire.mangeat@mangeat.ch/fanny.margairaz@mangeat.ch

Thomas Wehrli
Pachmann Rechtsanwälte AG
Löwenstrasse 29
8001 Zürich
+41 44 215 11 33
thomas.wehrli@pachmannlaw.ch

Grégoire Mangeat/Fanny Margairaz/Thomas Wehrli
Mangeat Avocats/Pachmann Rechtsanwälte, Geneva/Zürich, Switzerland

17st March 2016

Sports and Fraud: identifying the relevant framework

1. Are there specific legal forms for sports club (e.g. specific type of company structure, association, etc.) in your jurisdiction?

In general, there is no specific required form for sports clubs in Switzerland. Sports clubs can be organised in any allowed legal form outlined in the Swiss Code of Obligations or the Swiss Civil Code. As association law in Switzerland is very flexible with only few compulsory rules, many sports clubs are organised as associations[1]. The Swiss federal sport office estimates that there are over 20'000 sports clubs organised as associations in Switzerland[2].

However, there are possible (self-imposed) exceptions where a certain legal form is required. For example, the Swiss Football association organised the Swiss football league in a separate association. The rules of this association stipulate that the sports clubs playing in the highest national Swiss football league must be organised as private limited companies[3], like FC Basel 1893 AG. The same applies to the highest national hockey league, where only sports clubs organised as private limited companies are granted the licence to participate[4]. For example, the Hockey Club Davos is organised as a private limited company[5].

2. How are sports clubs / players grouped? Are they administrative bodies, associations, federations etc.? Please provide a few examples.

There is no administrative body governing all sports clubs. However, sports clubs in Switzerland are (voluntarily) mostly grouped in their respective national organisation. These national organisations are organised as associations as well, due to the liberal regulations which allow for utmost freedom in organisation. Examples include the Swiss Football Association, the Swiss Judo Federation, or the Swiss Rugby Association. Even Swiss Olympic, the national Olympic association grouping the national sports associations, is organised as an association. Switzerland is also well known for the international sports organisations domiciled in Switzerland. These international organisations are also organised as associations. Examples include the FIFA[6] or the International Olympic Committee[7].

---

[1] Art. 60-79 Swiss Civil Code.

[2] Sportvereine in der Schweiz, Bundesamt für Sport, 2011, p. 4.

[3] Art. 10 lit. b of the bylaws of the Swiss Football League.

[4] Art. 5 of regulations for granting a licence to play in the national league A or national league B of the Swiss Hockey Federation.

[5] Hockey Club Davos AG.

[6] Art. 1 of the bylaws of FIFA.

[7] Art. 15 of the Olympic Charter.

Athletes, if they are organised, are also grouped in associations. One of the biggest player organisations in Switzerland is the Swiss Association of Football Players, having over 570 members[8].

3. **What is the relevant regulatory framework for sports associations/clubs/etc. in your jurisdiction? Is State legislation applicable or is self-regulation applicable? Please provide a few examples.**

All sports clubs are first and foremost bound by the rules and regulations of their chosen legal form, as there is no general regulatory framework only applicable for sports clubs. Within the boundaries of the mandatory statutory legislation, sports clubs are free to determine all aspects of the management and the organisation. As outlined, the legal framework under Swiss Civil Code for associations is very liberal, containing only 24 articles regarding the general principles of organisation of associations. Sports clubs can tailor this legal form to their specific needs. The main difference between private limited companies and associations under Swiss law is that associations must be non-profit, meaning that any profits made may not be distributed to its members and must be used by the association in order to achieve its aims[9].

Two important areas, where state legislation is especially important for sports clubs and applicable irrespective of their legal form, are labour law and accounting regulations. In respect to employing athletes and staff, common labour legislation is applicable[10]. Additionally, accounting rules are applicable for all legal entities in Switzerland[11]. If associations are not undertaking commercial activities, the applicable accounting rules are very simple[12].

However, certain sports clubs or associations impose self-regulation. For example, Swiss Olympic requires national sports associations requesting subsidies from Swiss Olympic to prepare their annual accounts in accordance with a special accounting standard (Swiss GAAP FER 21)[13] and therefore intensifying the applicable state legislation.

Additionally, self-regulation may be imposed by certain national sports associations for granting their members the right to participate in their organised league. For example, the Swiss Hockey Federation not only obliges the clubs playing in the highest national league to be organized as private limited companies, but also sets objectives in regards to financial figures (e.g. share capital or liquidity)[14].

---

[8] *Cf.* http://www.safp.ch/

[9] BSK ZGB Heini/Scherrer, art. 60 N 1 ff.

[10] Art. 319 ff. Swiss Code of Obligations.

[11] Art. 957 ff. Swiss Code of Obligations.

[12] Art. 957 para. 2 Swiss Civil Code in connection with art 61 para. 2 Swiss Civil Code.

[13] http://www.swissolympic.ch/Portaldata/41/Resources/07_medien_downloads/publikationen/rechnungslegungshandbuch/fer21/Informations_Schreiben_Swiss_GAAP_FER_21.pdf

[14] http://cms.sihf.ch/media/3310/anhang-21-kriterien-und-massnahmen.pdf

One of the most well-known self-regulating bodies is the Court of Arbitration for Sport (CAS), based in Lausanne. Most national sports associations exclude ordinary jurisdiction in favour of the CAS. For example the Swiss Judo Federation[15] or the Swiss Football Association[16].

4. **Are there any sport-specific risks that you may think of? Are there specific legislation for such risks? The following should be considered:**

Except for Doping, Swiss law does not provide for specific legislation to mitigate sport related fraud risks. Applicable legislation can be found in the statutory general framework, amongst others for example in the Swiss Code of Obligations, the Swiss Civil Code and the Swiss Criminal Code.

Misappropriation of money

There are no sport specific legal frameworks preventing the misappropriation of money. The association law only requires an audit of the annual accounts upon the exceedance of certain thresholds or if a personally liable member requests to do so[17].

Within the chosen legal form, the person misappropriating the money is, irrespective of the legal form, required to refund the misappropriated amount[18]. Board members of sports clubs are additionally liable for the damage caused to the club[19]. Misappropriation can be punished by financial penalties or an imprisonment of up to a period of five years[20].

Certain associations also have self-imposed regulations. To mitigate the risk of the misappropriation of subsidies, Swiss Olympic requires their members to have their annual accounts audited, whereas the auditor has to comply with all legal requirements for statutory auditors[21].

Decision making process

As the sports clubs are free to determine their management and organisation within the legal boundaries, there is also no specific legislation governing the decision making process. In associations, the decision making process of the member's meeting follows the per capita principle, meaning each member has one vote[22]. However, the decision

---

[15] Art. 25 of the bylaws of the Swiss Judo Federation.
[16] Art. 92 of the bylaws of the Swiss Football Association.
[17] Art. 69b Swiss Civil Code.
[18] Art. 41, art and art. 678 Swiss Code of Obligations.
[19] Art. 55 Swiss Civil Code, art. 754 Swiss Code of Obligations.
[20] Art. 138 Swiss Criminal Code.
[21] Art. 4 Swiss Olympic Accounting Manual.
[22] Art. 67 Swiss Civil Code.

making power of the member's meeting depends on the delegation of competences to the other bodies within the association, which basically can be freely chosen[23].

One of the best known examples in Switzerland of the sports clubs' autonomy in regards to decision making is the FIFA's decision making process of the selection of the host country of the world championships. Until 2010, the host was solely decided by FIFA's executive committee, a body consisting of only 24 people. After the heavily contested decision of the executive committee to let Russia and Qatar host the world championships in 2018 and 2022, it was decided that the FIFA congress, *i.e.* all FIFA members, will chose the next host country[24].

It is obvious, that, when offering such wide discretion in terms of structuring and administering an association, corruption is an inherent risk. As of today, corruption is only prohibited in connection with public officials[25] or if corruption of private individuals leads to a distortion of competition[26]. However, sports organisations are deemed not to be in an economic competition, leaving corruption within the sports organisations unpunished[27]. In the light of the corruption scandals surrounding the decision making process of big sports events, the Swiss parliament decided to also penalise the corruption of private individuals, as they see a specific risk in the awarding of sports events[28]. This legislation is soon to be implemented.

Health Issues / Doping

The prevention of doping is one of the few sport related topics which are specifically covered by Swiss legislation. The Swiss Sport Promotion Act outlines in articles 19-25 the main measures against the use and sale of substances usable for doping. These measures include the restriction of the supply of substances usable for doping[29], the legal framework for the execution of doping controls[30] and applicable penal provisions for violations of the Sport Promotion Act[31]. The sanctions for violations can include financial penalties or an imprisonment of up to a period of five years. Remarkably, there are no criminal sanctions for the production, purchase, import, export or possession of prohibited substances for a person's own consumption[32].

---

[23] Art. 65 Swiss Civil Code.

[24] Art. 80 of the bylaws of FIFA.

[25] Art. 322ter-322^{octies} Swiss Criminal Code.

[26] Art. 4a Swiss Unfair Competition Act.

[27] Message of the federal council regarding the Swiss Unfair Competition Act dated November 10, 2004, p. 7009.

[28] Message of the federal council regarding the Swiss Criminal Code dated April 30, 2014, p. 3602.

[29] Art. 20 Swiss Sport Promotion Act.

[30] Art. 21 Swiss Sport Promotion Act.

[31] Art. 22 Swiss Sport Promotion Act.

[32] Art. 22 para. 4 Swiss Sport Promotion Act.

Additionally, Swiss Olympic implements self-regulation regarding doping and requires all members (national sports associations) to comply with the Swiss Olympic Doping Statute, which implements the World Anti-Doping Code in Switzerland[33]. This ensures the prevention of doping by an independent organisation. For example, the bylaws of the Swiss Judo Federation[34] or the Swiss Football Association[35] refer directly to the Swiss Olympic Doping Statute, defining also the CAS as independent appeal body against decisions of Swiss Anti Doping regarding doping offences[36].

Competition: Match fixing

Swiss law does not provide for specific regulations regarding the prohibition of match fixing or sports manipulation. An athlete fixing a match might be guilty of fraud, but only if the intent of illegally enriching someone by deceiving someone else can be proven[37]. This is not the case, for instance, when the bets are placed with an electronic betting system which, unlike human beings, cannot be deceived[38].

For more development on this issue, see question 11 below.

Online Gambling

The offering of commercial betting and the promotion of such services in the area of sports is prohibited[39]. A violation of the law can be sanctioned with a fine of up to CHF 10'000 and up to three months imprisonment[40]. The cantons may also allow exceptions[41]. According to the lottery oversight board, there are only two permitted sports betting providers in Switzerland[42].

For more development on this issue, please see question 12 below.

---

[33] Clause 4.2 para. 2 lit. o).

[34] Annex Doping to the bylaws of the Swiss Judo Federation, dated May 11, 2002.

[35] Art. 87 para. 2 of the bylaws of the Swiss Football Association.

[36] Art. 13.1.1 Swiss Olympic Doping Statute.

[37] Art. 146 para. 1 Swiss Criminal Code.

[38] Verdict SK.2011.33 and SK.2012.21, E.2.4.5., dated November 13, 2012.

[39] Art. 33 Swiss Lottery Act.

[40] Art. 42 Swiss Lottery Act.

[41] Art. 34 Swiss Lottery Act.

[42] http://www.comlot.ch/de/themen/zugelassene-grossspiele/sportwetten.

The case for compliance

5. How are risks to be evaluated with regard to corruption, fraud and other white-collar crimes? Are there internal control systems? Transparency criteria? Compulsory controls by auditors / administrative?

Due to the liberal legislation and the freedom of organisation in Switzerland, sports clubs are prone to corruption. There are no compulsory controls by auditors or any administration. However, (self-) regulation might apply if subsidies are involved (e.g. Swiss Olympic).

6. How is compliance applied to sports-organization? What differences are there compared to the "traditional" business world?

There are no special compliance regulations for sports organisations. Whereas the board of directors in private limited companies has, by law, certain duties which cannot be transferred[43] (e.g. the overall management of the company), the board of an association has only the duties which are assigned to the board by the bylaws of the association. Consequently, in private limited companies, the board has the final responsibility to ensure compliance, whereas next to the limited legal requirements for associations, there are no other requirements in terms of compliance.

However, like in business, the bigger the sports organisation is, the more sophisticated are the self-implemented compliance regulations.

7. Could you give examples of internal compliance process / internal decision-making processes?

The decision making processes or the internal compliance process in sports organisations depends on their organisation. If they are organised as associations, they may freely organise their processes.

For example, the Swiss Judo Federation clearly defines the competences and duties of the board in its bylaws[44]. The board is the highest governing body, directly subordinated to the general assembly, and responsible for the strategic management of the association. It is also the duty of the board to organise a suitable internal control system. The board has all powers for the management of the association if they are not assigned to another body. However, the board can only act within the boundaries set by the extended board[45] and the general assembly, which assure compliance with internal regulations due to the powers given to the different bodies. For example, the

---

[43] Art. 716a Swiss Code of Obligations.

[44] Art. 12 of the bylaws of the Swiss Judo Federation.

[45] The extended board consists of the board of the Swiss Judo Federation, a delegate of each cantonal federation as well as two athletes.

extended board approves the budget as well as the headcount[46], whereas the general assembly approves the financial accounts[47] which were audited before. If violations of internal regulations by members are detected, the disciplinary commission can sanction the guilty party. Verdicts of the disciplinary commission can be challenged at the appeals commission. The last appeal instance is the CAS in Lausanne.

As associations are free to choose their organisation, some associations have special bodies to control compliance. For example, FIFA introduced the ethics committee as body to ensure compliance with the FIFA's code of ethics. The code of ethics applies to conduct that damages the integrity and reputation of football and in particular to illegal, immoral and unethical behaviour[48]. The ethics committee has the power to impose anything from issuing a warning to banning someone from taking part in any football related activity[49]. The ethics committee is divided in an investigatory and an adjudicatory chamber, which are both involved in case of proceedings[50]. The investigatory chamber's duty is to investigate potential breaches of the FIFA Code of Ethics and, if breaches are detected, prepare a report on the investigation proceedings and forward this report to the adjudicatory chamber[51]. The adjudicatory chamber reviews the investigation files can undertake further investigations and decide whether to close the proceedings or adjudicate the case[52]. As within the Swiss Judo Federation, a decision by the ethics committee may be contested at the appeals committee and afterwards at the CAS[53].

The issue of sanctions

8. According to which provisions (e.g. criminal law, regulatory law, and administrative law, etc.) may a sports association be sanctioned in your jurisdiction?

Under some specific conditions developed under question 9 below, a sports association in Switzerland may be sanctioned according to criminal law. For the rest, there is no specific regulatory or administrative provisions targeting sports associations.

---

[46] Art. 16 of the bylaws of the Swiss Judo Federation.
[47] Art. 8 of the bylaws of the Swiss Judo Federation.
[48] Art. 1 FIFA Code of Ethics.
[49] Art. 6 FIFA Code of Ethics.
[50] Art. 26 FIFA Code of Ethics.
[51] Art. 28 FIFA Code of Ethics.
[52] Art. 29 FIFA Code of Ethics.
[53] Art. 80 f. FIFA Code of Ethics.

In particular, there is no state supervisory authority for sports associations as it exists, for instance, for foundations. In view of the recent FIFA scandal, a group of Swiss parliamentarians put forward in June 2015 a postulate inviting the Federal Council to examine whether the mere application of the general provisions on associations was still adequate for sports associations with huge turnover such as FIFA and, in particular, whether a specific state supervision of such sports associations should be put in place.

This postulate was firmly rejected by the Federal Council in September 2015, which considered that the associations' sector as a whole was functioning well, and that the general assembly of the association was adequate to exercise the supervision on the association's activity. The protection of the creditors was also sufficiently guaranteed by the fact that when an association reaches a total balance sheet of CHF 10 Mio., a turnover of CHF 20 Mio., and/or employs more than 50 persons per year (two of those criteria must be fulfilled), it must submit its accounting to an independent auditor.

The postulate must still be examined by the two chambers of the Parliament, which might well have a different opinion and decide that a specific regulation of sports associations would be necessary after all.

9. Who may be sanctioned within the association (e.g. the association itself, the board, an employee)? Please provide examples of applicable sanctions in the recent years.

Principles

The primary subject of criminal law is the natural person, so that the first person to be sanctioned would certainly be the employee or the organ of the association who actually committed the offence.

Now under certain specific conditions, the association itself, as a legal entity, might also be sanctioned by the Swiss Criminal Code ("**SCC**"):

- First, alternatively to a natural person (**subsidiary liability** – article 102 para. 1 SCC): if due to inadequate organization of the association, it is not possible to attribute the offence to any specific natural person, then the act is attributed to the association itself. The inadequate organization must be the reason why criminal authorities could not determine which natural person actually committed the offence;
- Second, irrespective of the liability of any natural person (**primary liability** - article 102 para. 2 SCC): if the association is responsible for failing to take all the reasonable organizational measures that were required in order to prevent the offence to be committed, the association might be held liable for this organizational failure. If a specific individual can be identified as the offender, both him and the association may be held liable. This primary liability however

only applies for an exhaustive short list of specific and serious offences[54]. Furthermore, with regards to the offence of private bribery - which is often relevant in fraud case in the sports community - we will see below that there are doubts as to whether in its current form, it can be applied to sports association. Also, private bribery is only included in the aforementioned list in its active form (payment of a bribe), and not in its passive form (reception of a bribe). As a result, and although several recent bribery cases precisely concern sports associations' executives accused of having received corrupt commissions to attribute a contract or a sporting event, the association can not be held liable for such passive acts of corruption within its realm as long as the offenders have been identified (if not, article 102 para. 1 could apply).

In both forms of liability, the sentence is a fine not exceeding 5 million francs.

The above mentioned limitations, together with the relative recent introduction of the concept of the criminal liability of legal persons in Switzerland (2003), might explain why, as of today, there is almost no know case of a sports association having been prosecuted in Switzerland.

Examples of cases

The one famous case concerned FIFA: The general prosecutor of the Basel canton opened in 2005 a criminal investigation against two FIFA executives in relation with corrupt commissions they had received from a company in exchange of the attribution of different media and marketing rights, and against FIFA itself for its lack of internal organization which eventually prevented to identify all the natural persons involved with the corrupt activities (art. 102 para. 1 SCC). Although all the prerequisites were fulfilled to condemn FIFA and its two executives, the investigation was eventually closed after the two executives accepted to pay CHF 5.5 Mio. of compensation to FIFA, as permitted by law when the offender has made reparation for the loss or made every reasonable effort to right the wrong that he has caused.

Another interesting illustration is the recent FIFA scandal in Switzerland:

In September 2015, the Office of the Attorney General of Switzerland (OAG) opened a criminal investigation against FIFA President Mr. Sepp Blatter, on suspicion of criminal mismanagement as well as – alternatively – on suspicion of misappropriation, with regards to the signature and implementation of a contract with the Caribbean Football Union unfavourable to FIFA, as well as to a disloyal payment of CHF 2 Mio. to Mr. Michel Platini, President of the Union of European Football Associations (UEFA).

---

[54] Criminal organization (260ter SCC), finance of terrorism (260^{quinquies} SCC), money laundering (305bis SCC), bribery of Swiss public officials (322ter SCC), granting an advantage (322^{quinquies} SCC), bribery of foreign public officials (322^{septies} para. 1 SCC) and private bribery (4*a* para. 1 lit. a UCA).

In this case, the abovementioned limitations are likely to prevent any conviction of FIFA itself, even if the commission of the offence is confirmed, since a) as a natural person is convicted, there is no room for a subsidiary liability of the association pursuant to article 102 para. 1 SCC and b) neither criminal mismanagement nor misappropriation are included in the serious offences leading to a primary liability of the association pursuant to article 102 para. 2 SCC.

Now six months earlier, the OAG had already opened a first criminal investigation in this context, this time against persons unknown, on suspicion of criminal mismanagement and of money laundering in connection with the allocation of the 2018 and 2022 Football World Cups.

With regards to this investigation, a condemnation of FIFA is conceivable if the commission of the offences is confirmed. Indeed, if due to FIFA's inadequate organization the natural person(s) having actually committed the offence is never found, FIFA could potentially be held criminally responsible for criminal mismanagement and/or money laundering, pursuant to article 102 para. 1 SCC (subsidiary liability). Furthermore, since money laundering is one of the serious offences mentioned in article 102 para. 2 SCC (primary liability), FIFA could also be held liable irrespective of the conviction of the responsible natural person - *i.e.* even if a natural person is eventually convicted - for having failed to take the reasonable organizational measures to prevent such offence to be committed. Still, to our knowledge and as of today, FIFA itself has not been accused by the OAG (yet).

10. How do those sanctions interact with decisions from State courts? Is there a need for enforcement of the sanctions (i.e. is there a filter / exequatur process by State courts, as in arbitration)? Is there a possibility for State courts to consider a case also examined by a regulatory body, e.g. a federation (i.e. is there a risk of "double jeopardy")?

As indicated under question 8 above, there are no specific regulatory or administrative provisions applicable to sports association, so that there is no risk of double jeopardy.

With regards to sanctions pronounced by sports association, we often see State courts examine a case that is also being examined by the competent sports association. If we take the abovementioned FIFA scandal for instance, Mr. Sepp Blatter has been suspended for eight years by the FIFA Ethics Commission in December 2015 in relation to an ungrounded payment of CHF 2 Mio. to Mr. Michel Platini in 2009. This sanction, purely internal to FIFA, did not prevent the Swiss OAG to open criminal investigations against the same Mr. Sepp Blatter in relation to the same facts, as discussed under question 9 above. Indeed, sports associations' sanctions are of civil nature as they ensue from the fact that athletes and clubs have accepted the internal regulations of their private law associations. Said sanctions are therefore of a different nature than the potential criminal sanctions taken by State courts and do not lead to a risk of double jeopardy.

Case studies: Online gambling, doping scandals and whistleblowing

11. What are the legal consequences with regards to match-fixing in your jurisdiction? Please specify the relevant legal framework.

Besides the different disciplinary sanctions provided for by each sports federation for their members, there is currently no specific provision punishing match-fixing in Switzerland. In particular, a specific "*sporting fraud*" offence does not exist yet. We will see below that the current provisions are not adequate to address match-fixing issues, but that Switzerland has recently launched legislative amendments to remedy this legal gap.

Current law: Fraud

Currently, the only angle to attack match-fixing by the criminal route is still, potentially, the general offence of fraud (article 146 SCC), which punishes any person who with a view to securing an unlawful gain willfully induces an erroneous belief in another person by false pretenses or concealment of the truth, or willfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another's financial interests. The offender is liable to a custodial sentence not exceeding five years or to a monetary penalty up to CHF 1,080,000.

Now as a parliamentary report stressed in 2012, this fraud offence is far from appropriate to cover sportive type of fraud, as its scope is too narrow. In particular, it only allows the protection of certain financial interests (such as the interests of bookmaker companies), but not the fairness and credibility of sporting events[55].

This was particularly highlighted by a series of criminal proceedings launched by the OAG in 2012 for fraud and complicity of fraud against eight football players accused to have committed different game manipulations - such as letting the adverse club attack without opposing resistance - in exchange of moneys, within the context of a major international football match-fixing and irregular betting scandal. While five players have been definitely condemned to conditional monetary penalties, the three players who challenged their condemnation up to the Swiss Supreme Court were eventually acquitted by the latter, which considered that it had not be proven that any natural individual, within the bookmaker company, had been misled. This highlighted an important shortfall: as the misleading of a natural person is a prerequisite of the fraud offence, **all online gambling activities**, *i.e.* gambles made without the intervention of any natural person, **are simply not covered by article 146 SCC**, nor are in such case the potential accomplices to the gambling fraud, and in particular the players who accepted to manipulate the games in this context.

---

[55] "*Lutte contre la corruption et les matchs truqués dans le sport*", Report of the Commission on science, education and culture of the Swiss Council of States, dated 7 November 2012, p. 60 onward.

There are also doubts whether match-fixing aiming "*only*" at distorting sportive competition (as opposed to aiming at illegal betting) - for instance to maintain a sportive club in its division - would be covered by article 146 SCC, as there is no clear direct prejudice to anyone's financial interests in such case.

This leaves the criminal authorities and the sports associations quasi unarmed to address match-fixing issues.

Draft new "manipulation of competition" offence on discussion

To address this serious loophole, the Federal Council adopted in October 2015 adopted a draft amendment to the Federal Sports and Physical Activity Promotion Act that proposes to introduce a specific bribery offence for sports called "*manipulation of competition*"[56]. Considered as a bribery offence and not linked to the offence of fraud, it shall primarily protect the integrity of sports and not the financial private interests of the sports organization or operators of sports betting.

Each person able to influence the course of a sports competition can be concerned, *i.e.* the athletes themselves but also the referees, the coaches, their team, potentially the sports technician or a veterinarian, but not the public or any temporary troublemaker. Only competitions for which bets have been made are concerned, which excludes manipulations which "*only*" aims to distort sportive competition, for instance to remain in ones division.

As for bribery offences, the manipulative act can be active (payment of an undue advantage) or passive (reception of an undue advantage). The conclusion of such illegal agreement is enough, it will not be necessary that the manipulation is actually executed or that it works as planned.

The offence will not apply if no such agreement was concluded however. In particular, doping activities or manipulation of sports equipment will not be covered.

The sanctions are the same as for private bribery, *i.e.* a custodial sentence up to three years or a monetary penalty up to CHF 1,080,000. It might be higher if the offender operates in gangs or are professional of such manipulation. In such case, the sanction might a custodial sentence up to five years and a monetary penalty.

The parliament will now examine the project and decide whether they want to adopt the draft or not.

Private bribery

Finally, another angle to attack match-fixing issues could be private bribery: as an undue advantage given to a private person to make him act or fail to act, within the

---

[56] Message of the Federal Council concerning the Gambling Act, dated 21 October 2015.

context of his professional or commercial activities, in breach of his trust and loyalties duties to his employer, principal or partner, match-fixing could indeed fall within the realm of article 4a of the *Unfair Competition Act* (UCA*)* punishing private bribery, which is sanctioned with a custodial sentence up to three years or a monetary penalty up to CHF 1,080,000.

Now as Swiss law currently stands, it is debated whether match-fixing fulfills the prerequisite of that provision. Indeed, unlike the offences related to bribery of public officials, bribery in the private sector is (still) regulated by the UCA*,* which implies that only an act of unfair competition, which means an act likely to favor or to disadvantage a company in its struggle to acquire clients or to increase or decrease its market share, is punishable.

This feature leads to doubt that, in its current form, the offence of private bribery would cover the act of match-fixing, as it is not sure that competition between clubs falls within the notion of competition under the UCA.

To address this issue, Switzerland adopted last September a draft amendment to the SCC which inserts the offence of private bribery into the SCC and removes the condition of a complaint (which was the other major criticism to the current provision), at least for serious cases. The referendum deadline to oppose that amendment expired unused on 16 January 2016, so that the Swiss government shall soon fix date for implementation of the new provision.

It remains to be verified in practice whether this amended offence will be used to prosecute match-fixing acts.

12. How is online gambling considered in your jurisdiction and how is it dealt with in case of fraud?

Current law

The Swiss Lotteries and professional Gambling Act prohibits the offer and conclusion of bets related to sportive events in Switzerland, but allows cantons to authorize companies serving the public interest or having a charitable purpose to organize such bets when they take place on their territory. As of today, two Swiss companies have been allowed to organize such bets, including online gambling, one for the German and Italian part of Switzerland, and one for the French part. All other offers of sports bets are prohibited, including in particular offers coming from abroad.

The professional offer of prohibited sports bets as well as its advertising in Switzerland is illegal and sanctioned by a prison sentence of maximum three month and/or a fine up to CHF 10’000. However, the mere participation to such unauthorized bets, including online gambling, is not punished. The current legislation does not provide for any specific provisions on irregular betting.

Draft amendment on discussion

Wiling to strengthen this legislation, the Swiss Government adopted in October 2015 a new Gambling Act which brings together the Lotteries and professional Gambling Act and the Casinos Act. Among other innovations, the draft puts in place a series of measures against the manipulation of sports competition in relation to sports bets, based on cooperation between the sports associations, the operators of sports betting and the supervisory and judiciary authorities.

As a first series of measures, the operators of sports betting must of course be independent from the sports associations and the athletes who plays in the competition for which the bets are offered. They will also need to put in place a supervisory system aiming at detecting manipulations and prevent that manipulated competitions are the object of bets. Sports bets will only be allowed for sports events for which the manipulation risk is low. Finally, the operators will have the obligation to report any manipulation suspicion they might have to the competent supervisory body.

A similar obligation will exist for the sports associations seated in Switzerland which participate to a sports competition in Switzerland or for which sports bets are offered in Switzerland, or which organize, operate or supervise such competition.

The supervisory authority will have all the necessary powers to carry out its activity. In particular, it will be able to order to the operators of sports bets to interrupt a bet in case of well-founded suspicion of manipulations.

The ball is now in the parliament's court which will examine the draft and decide whether they adopt it.

13. Are any measures foreseen in your jurisdiction for the protection of "whistle-blowers"?

Current law

Public sector

Specific measures regarding whistleblowers have been introduced in the Federal Personnel Act in 2011 with regards to the employees of the Confederation. The Act provides for specific channels to disclose suspected wrongdoings at work, depending on the seriousness of the latter:

- With regards to criminal offences which are automatically prosecutable, employees of the Confederation not only can but have now the obligation to report them to either a) the criminal authorities, b) their superiors or c) the Swiss Federal Audit Office, which is the supreme audit institution of the Swiss Confederation, an independent body only bound by the Constitution and the law;
- With regards to other irregularities that they discover in the course of their official duties, the employees are entitled to report them to the Swiss Federal Audit Office, which investigates and takes the appropriate measures. Reasonable suspicion suffices for such notification, no evidence is required.

Now if they go public or go to the press with such information/reports, employees of the Confederation breach their official secrecy obligations or violate their duty of loyalty.

In both cases, the Act stipulates that the act of reporting may not be detrimental in any way to the whistleblower's position. The illicit dismissal of an employee can in principle not be cancelled and only leads to the payment of an indemnity of six to twelve months' salary. Now if the illicit dismissal was caused by a licit report of the employee, the employer must offer him the possibility to return to his employment or to take another suitable employment.

Each canton remains free to rule on its own employees.

Private sector

Swiss private law does not provide for specific provisions protecting whistle-blowers in the private sector, which are thus much less protected. Each case is judged in accordance with the general labor provisions contained in the Swiss Code of Obligations, as interpreted by the case law.

According to those, the right for an employee to report suspected wrongdoings at work outside his workplace must be weighed up taking into account the different interests at stake, i.e. the public interest in the law enforcement, the public debate in democracy and ethics, the employee's freedom of expression, the employee's contractual duty of loyalty, the employer's interests as well as the suspected person's ones, and must be proportionate. In principle, the proportionality principle requires that the employee first tries to report to its superiors, and only in the absence of reaction from him, the competent authorities before, as a *ultima ratio*, the public or the media.

This weighing up of interests is currently done by the tribunals which determine on a case by case basis whether a report fulfils those conditions, i.e. whether it is licit.

The dismissal of an employee whose report of wrongdoings was licit is abusive. In such case, the dismissal remains valid – the employee can in particular not reclaim his employment – but the employer may be condemned to pay to him an indemnity of maximum six months' salary - the usual sanction for an abusive dismissal.

With regard to business organisation, Swiss company law does not provide for an obligation to set up an internal reporting procedure. Now such obligation may indirectly ensue from other provisions, such as article 102 para. 2 SCC discussed earlier, according to which a company may be held liable if it is responsible for failing to take all the reasonable organizational measures that were required in order to prevent an offence to occur. A company was so condemned in 2006 because its compliance department was not sufficiently staffed nor independent enough to prevent the corruption offences who were committed by its employees.

Likewise, labour law obliges the employer to take all the necessary and feasible measures to protect the employee's personality's rights, and the Swiss supreme court

confirmed that the appointment of a person of trust, within or outside the company, to which employees can report potential abuses, could be impose to a company on this legal basis.

Considerable discretion is currently let to the tribunals in this area.

Draft amendment in discussion

To improve legal certainty, the Swiss government issued a draft amendment to the Swiss Code of Obligations, which specifically fixes the conditions regulating the report, by an employee, of suspected wrongdoings at work. This draft, which mainly fixes in writing the principles laid down by the jurisprudence, gives priority to internal reports: in principle (exceptions exist), the report will be considered licit only if the employee has addressed his report to his employer first, then to authorities, and only as last resort to the public. The employer is so given the opportunity to remedy the identified defects itself.

The protection against abusive dismissals is not improved though. Due to widely divergent views on this issue, the Swiss Government decided to leave the topic out of its reform for the moment.

The draft was accepted by the Swiss government in November 2013 and sent to Parliament for debates and adoption, but the latter sent it back to the Swiss government in 2015 for a redrafting in a simpler and more understandable way.

14. How is confidential information treated in your jurisdiction? Any risks for whistle-blowers?

With regards to employees of the Confederation, anonymous reports can be made and are processed, although they are not encouraged as the reliability of the information source cannot be checked and further questions are not always possible. If the whistleblower accepts to give his identity, the Swiss Federal Audit Office generally treats the origin of the information as confidential but the latter's employees have no right to refuse to testify in court proceedings. There is thus no total guarantee of confidentiality for the whistleblower.

With regards to employees in the private sector, most large companies have put in place whistleblowing systems that allow anonymous reports, but it is not an obligation for the employer. To encourage employees to give their identity, those companies usually try to ensure confidentiality as far as practicable, but there are no legal obligations in this respect.

It would actually be very difficult to guarantee the employee's anonymity, as the person whose behavior is reported as suspicious is in any case allowed to file a claim for defamation against the whistleblower, which would allow him to have access to the file and, eventually, to the latter's identity.

The Federal Data Protection Act also allows the person being denounced to have access to all data related to him, including the name of the whistleblower who

denounced him. This right may be restricted when required to protect the overriding interests of third parties, *i.e.* in this case, the whistleblower. The employer will need to proceed with a careful weighting of interests between the denounced person's and the whistleblower's interests. Doctrine considers though that restrictions to the denounced person's right to have access to its file should be restrictively applied.

There is thus no total guarantee of confidentiality for the whistleblower in the private sector either, and the draft amendment does not provide for more protection in this regards.

It is noteworthy that with regards to bribery, the Federal Office of Police launched in summer 2015 a web-based reporting platform, with which people can submit directly an anonymously information on any criminal acts of corruption. The anonymity of the informant is fully guaranteed in this case[57].

The Federal Criminal Police reviews each report for criminal relevance before forwarding it to the competent internal office or external agency such as the police for follow-up action.

Information on irregularities in federal administrative units that do not appear to have a criminal background are forwarded to the Federal Audit Office for follow-up action.

The platform is brand new so that its results remain to be evaluated.

***

Disclaimer

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2016.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been

[57] www.luttecontrelacorruption.ch

previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.